

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. M-09/08-441
)
 Appeal of)

INTRODUCTION

The petitioner, by and through her mother, appeals the decision by the Department of Disabilities, Aging and Independent Living (DAIL) finding her ineligible for Community Developmental Services (CDS). The issue is whether the petitioner meets the definition in the regulations as having a developmental disability.

FINDINGS OF FACT

1. The petitioner is a twenty-seven-year-old woman. Testing that was done in 2000, when she was eighteen and in school, showed that she had a full scale IQ of 72.

2. On the basis of this testing the Department, in a decision dated September 2, 2008, denied her application for CDS based on the fact that she did not meet the criteria regarding mental retardation. The petitioner appealed this decision to the Board on September 29, 2008.

3. At a telephone status conference held on November 13, 2008 the parties informed the hearing officer that they

had agreed to have the petitioner undergo an updated evaluation of her intellectual and adaptive behavior functioning in order to determine her eligibility for CDS at this time.

4. The evaluation in question was performed on November 6, 2008. At a status conference held on December 17, 2008, the matter was continued to allow the petitioner to try to obtain an attorney. In March 2009 the parties informed the hearing officer that the matter should be decided on the basis of the November 2008 testing and that a motion for summary judgment would be filed by the Department. A copy of the report of the testing was received by the Board on March 11, 2009. This recommendation was delayed for several months pending receipt of the Department's motion.

5. The testing done in November 2008 concluded that the petitioner has a "substantial deficit in adaptive behavior" as defined by the CDS regulations. However, the intelligence tests that were performed showed that the petitioner has an IQ of 75 Verbal, 74 Performance, and 72 Full Scale. The report of the testing included the following conclusions and recommendations:

[Petitioner] has present measures of her intellectual functioning that are predominately in the "Borderline" range with a deficit and relative weakness in the

"Extremely Low" range for "Processing Speed". Based on these standard scores, it cannot be clearly concluded that there is a "significantly subaverage cognitive function" level that would support a diagnosis of mental retardation. The available records of previous intelligence testing indicate "mixed" results with some IQ measures greater than 2 standard deviations below the mean and some above this cut-off criterion. These variations may be more a reflection of her ongoing variations in medical needs from the Arnold-Chari syndrome, spine bifida affecting breathing vocal cord paralysis, bowel functioning, mobility, apparent visual delays, speech and language, and apparent learning disabilities.

Eligibility Determination: [Petitioner] does not meet the criteria for a diagnosis of mental retardation and in this regard she is determined to be not eligible for developmental services as an adult as per The Regulations Implementing The Developmental Disabilities Act of 1996, July 1998.

ORDER

The Department's decision is affirmed.

REASONS

"Developmental disability" is defined in 18 V.S.A. § 8722(2) as follows:

"Developmental disability" means a severe, chronic disability of a person that is manifested before the person reaches the age of 18 and results in:

- (A) mental retardation, autism or pervasive developmental disorder; and
- (B) deficits in adaptive behavior at least two standard deviations below the mean for a normative comparison group.

The Act further mandates, at 8726(a)(1), that "the department shall adopt rules that include . . . [c]riteria for determining whether an applicant is a person with a developmental disability".

In its regulations DAIL defines "a person with a developmental disability" as "a person who . . . has mental retardation or a pervasive developmental disorder . . . which occurred before age 18 . . . and . . . substantial deficits in adaptive behavior which occurred before age 18." Reg. 1.07 (emphasis added). There appears to be no dispute in this case that the petitioner meets the "adaptive behavior" criteria, and that she does *not* have a "pervasive developmental disorder". Thus, the issue as framed by the parties is whether she meets the definition of "mental retardation".

The Department's regulations define "mental retardation" as requiring "significantly sub-average cognitive functioning documented by a full scale score of 70 or below on an appropriate standardized test of intelligence". Reg. 1.05. As noted above, IQ testing of the petitioner done in 2000 and 2008 both indicated a full scale IQ of 72. As also noted above, the evaluator in 2008 specifically concluded that the testing did not support a diagnosis of mental retardation.

It certainly appears that the petitioner comes very close to meeting the CDS program criteria, and that she might well benefit from the services available through that program. However, based on the evidence submitted it cannot be concluded that the Department's decision in the matter is not in accord with the applicable statute and regulations. Therefore, the Board is bound by law to affirm the Department's decision. 3 V.S.A § 3091(d), Fair Hearing Rule No. 1000.4D.

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